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5 UNITED STATES DISTRICT COURT
6 NORTHERN DISTRICT OF CALIFORNIA

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10 MH PILLARS LTD, et al.,
11 Plaintiffs,
12 v.
13 CAROL REALINI, et al.,
14 Defendants.

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16 Case No. 15-cv-1383-PJH

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**ORDER RE MOTIONS TO DISMISS
FIRST AMENDED COMPLAINT**

25 Defendants' motions to dismiss the first amended complaint ("FAC") for failure to
26 state a claim came on for hearing before this court on June 14, 2017. Plaintiffs MH
27 Pillars Ltd. ("MHP-UK") and MH Pillars Inc. ("MHP-USA") appeared by their counsel Peter
28 Fredman. Defendants Carol Realini ("Realini"), Rodney Robinson ("Robinson"),
Christopher Martin ("Martin"), and Ultralight Inc., f/k/a Obopay, Inc. ("Obopay") appeared
by their counsel Lee Marshall and Alexandra Whitworth. Defendant Accelerated
Commerce Solutions, Inc. ("ACS") appeared by their counsel Patricia Welch and
Christopher Karagheuzoff.

Having read the parties' papers and carefully considered their arguments and the
relevant legal authority, the court hereby GRANTS the motion of Realini, Robinson,
Martin, and Obopay ("Obopay defendants") in part and DENIES it in part, and GRANTS
ACS's motion, in which the Obopay defendants filed a joinder.

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BACKGROUND

2 Plaintiff MHP-UK is a UK corporation that operates an on-line payment service-
3 provider called "Payza." FAC ¶¶ 1, 12. Plaintiff MHP-USA is a New York corporation
4 that is a wholly-owned subsidiary of MHP-UK. FAC ¶¶ 2, 18. MHP-UK allegedly
5 "incorporated MHP-USA as a wholly-owned subsidiary for the purpose of entering into an
6 agency agreement with Obopay through which Payza money transmission operations
7 would be conducted in the U.S." FAC ¶ 18. Firoz Patel and Ferhan Patel are principals
8 (officers and/or directors) of MHP-UK and MHP-USA.

9 The following facts are as alleged by plaintiffs in the FAC. In 2012, defendant
10 Obopay (also an on-line payment service-provider) was seeking investors or a sale of its
11 assets. FAC ¶ 14. Defendant Martin was Obopay's "chief compliance officer." FAC
12 ¶ 15. At that same time, Firoz Patel and Ferhan Patel were "seeking a compliance
13 solution for Payza U.S. operations." FAC ¶ 16. Martin traveled to Montreal, Canada, in
14 February 2012, allegedly to "pitch Obopay's compliance solutions" to the Patels, among
15 others. FAC ¶ 17. Plaintiffs assert that Martin represented that Obopay was a "fully
16 licensed money transmitter in the U.S." and had "expertise in MTL compliance." FAC
17 ¶ 19. They claim that it was only after MHP-USA received the proposed "Agent
18 Agreement" in March 2012 that they learned that Obopay was not a fully-licensed money
19 transmitter. Id.

20 Nevertheless, despite having this information, MHP-USA entered into the Agent
21 Agreement with Obopay on March 28, 2012. FAC ¶ 20. The Agent Agreement provided
22 that Obopay would appoint MHP-USA as its agent and would provide Obopay with
23 certain regulatory compliance services in support of MHP-USA's money transfer services.
24 FAC ¶ 20 & Exh. B. Plaintiffs assert that MHP-USA entered into the Agent Agreement in
25 reliance on Martin's representations that the Obopay MTLs for New York and California
26 were "pending." FAC ¶¶ 20-21; see also FAC Exh. B, Appendix 1.

27 Plaintiffs allege that about a month after execution of the Agent Agreement, they
28 learned that Obopay was for sale when Martin asked if they were interested in

1 purchasing it. FAC ¶ 25. However, plaintiffs did not purchase Obopay at that time. By
2 October 2012, Obopay had found a buyer that intended to abandon the U.S. operations
3 and MTLs. FAC ¶ 26. On November 9, 2012, Obopay was sold to an overseas buyer,
4 OBP Investments, Inc. ("OBP"). FAC ¶ 27. Plaintiffs allege that OBP made no effort to
5 comply with the assignment provisions of the Agent Agreement or satisfy regulatory
6 "change of control" requirements. FAC ¶ 28. In addition, OBP took steps to shut down
7 U.S. operations effective December 31, 2012. FAC ¶ 29.

8 On December 1, 2012, defendant Robinson, "a former Obopay executive,"
9 allegedly approached Firoz Patel about purchasing the Obopay MTL assets from
10 defendant ACS, described as Robinson's "new Silicon Valley start-up company." FAC
11 ¶ 30. ACS had acquired the MTL assets from defendant Realini, who had acquired
12 Obopay from OBP). FAC ¶¶ 33, 37. On December 20, 2012, ACS entered into a
13 "Professional Services Agreement" with MHP-USA to perform due diligence and prepare
14 legal documents for the proposed transaction. FAC ¶ 36 & Exh. E. MHP-USA allegedly
15 agreed to pay for the associated legal services. FAC ¶ 36.

16 Plaintiffs claim that the individual defendants developed and implemented a
17 "transactional structure" that included three agreements (referred to in the FAC as the
18 "2013 Transaction"). See FAC ¶¶ 37-41 & Exhs. F-H.

19 First, plaintiffs allege, the "old" Obopay made Robinson its Chief Financial Officer,
20 and on January 25, 2013, Robinson executed an employment agreement with Realini,
21 pursuant to which she was hired as Obopay's Chief Executive Officer ("CEO"). FAC
22 ¶ 37(a), (b). On January 30, 2013, OBP sold its shares of Obopay (stripped of non-MTL
23 assets) to Realini in exchange for her assumption of certain U.S. liabilities worth less than
24 \$500,000; and on January 31, 2013, the "new" Obopay sold MHP-UK 9% of its preferred
25 stock for \$1,250,000 pursuant to the "Obopay Inc. Series A Preferred Stock Purchase
26 Agreement" ("Stock Agreement") in which Obopay covenanted to retain a balance of at
27 least \$1,000,000 on deposit in a segregated bank account, as required by MTL licensing
28 agencies. FAC ¶ 37(c), (e), (f) & Exh. F. Thus, the parties to the Stock Agreement are

1 Obopay and MHP-UK. See FAC Exh. F.

2 Second, on February 4, 2013, the "new" Obopay and Realini entered into the
3 second portion of the "2013 Transaction" – the "Option Agreement" – pursuant to which
4 MHP-UK paid \$400,000 for an option to acquire the remaining 91% of stock in Obopay at
5 a future date for \$10. FAC ¶ 37(g) & Exh. G. Thus, the parties to the Option Agreement
6 are Obopay, Realini, and MHP-UK. See FAC Exh. G.

7 Third, plaintiffs allege that the "2013 Transaction" also included the "ACS
8 Agreement" – described in the FAC as "an agreement whereby defendant ACS agreed to
9 operate Obopay for plaintiffs' benefit and at plaintiffs' expense during a transition period
10 before MHP-UK acquired the remaining 91% of Obopay stock." FAC ¶ 38 & Exh. H; see
11 also FAC ¶ 39. Since the "ACS Agreement" is not dated or signed, it is not entirely clear
12 who plaintiffs believe the parties are, apart from (presumably) ACS.

13 Plaintiffs allege that several issues prevented Obopay from being a fully licensed
14 money transmitter in the U.S., including that Obopay had "effectively abandoned" its MTL
15 assets by early 2012 and by April 2012 was "out-of-compliance for most state licenses
16 because it had no current audit." FAC ¶ 47(a). They claim that approvals of the New
17 York and California MTLs were never "imminent" as Martin had represented. FAC
18 ¶ 47(b). Plaintiffs claim they were unaware of "[t]hese issues," and they relied on
19 Obopay's "purported compliance expertise" and on Robinson/ACS to perform necessary
20 due diligence and procure the necessary legal advice and structure and implement "a
21 suitable transaction" (as they claim Robinson/ACS had agreed to do). FAC ¶ 48.

22 Plaintiffs assert that in early 2013, Robinson, Martin, and Realini "decided to
23 double-cross plaintiffs as a means of exiting the 2013 Transaction without repaying the
24 benefits they had obtained from it." FAC ¶ 49 (citing Doc. 51-7, Realini Decl. in Support
25 of Defs' September 21, 2016, Motion for Bond to Secure Costs and Fees). Defendants
26 allegedly did this (a) by causing Obopay to report to the U.S. Department of Homeland
27 Security ("DHS") that plaintiffs were engaged in unlawful activity, and (b) by hiring an
28 investigator to pursue the charges privately and then unlawfully charging plaintiffs

1 \$25,000 for the cost of the investigator, falsely claiming the charge was for an "audit." Id.

2 Plaintiffs assert that defendants appeared to be trying to help them obtain the
3 licensure, but in fact were not, and had no intention of resolving any compliance issues.
4 FAC ¶¶ 50-53. Plaintiffs allege that the parties established a "board-level 'Obopay/Payza
5 Compliance Committee' to address the issues," which met on March 28, 2013, with
6 Realini, Robinson, and Martin present on the call, FAC ¶¶ 51-52.

7 During this meeting, Realini, Robinson, and Martin allegedly represented that they
8 had determined that the existing Obopay agency program was "non-compliant;" that
9 Obopay needed custody and control of an amount equal to U.S. client funds in
10 Obopay/Payza customer accounts for MTL compliance purposes; and that this issue
11 could be resolved through MHP-USA's transfer of the funds and the provision of daily
12 customer balance reports to Obopay. FAC ¶ 52.

13 Plaintiffs claim that these representations were intentionally false because the
14 defendants did not intend to resolve any compliance issues. FAC ¶ 53. Plaintiffs also
15 assert that defendants failed to disclose that they had already engaged in "hostile action"
16 against plaintiffs, including initiating a private investigation and reporting suspected
17 criminal activity to DHS, "with the intent of reneging on the 2013 Transaction." Id.
18 Plaintiffs claim that defendants made these false representations with the intent of
19 inducing plaintiffs to transfer the funds, and that on April 10, 2013, in reliance on
20 defendants' false representations and non-disclosures, MHP-USA transferred \$4 million
21 in customer funds to defendants' control. FAC ¶¶ 53-54. This sum allegedly represented
22 "all Obopay/Payza U.S. customer funds plus a \$100,000 buffer." FAC ¶ 54.

23 On June 3, 2013, Obopay and Realini sent a letter in which Obopay notified MHP-
24 USA/Payza that in accordance with the provisions of the Agent Agreement, it was
25 suspending all Obopay services and Payza's agency appointment, "in order to avoid a
26 violation of legal requirements, or to investigate or respond to reasonably suspected
27 fraudulent activity." FAC ¶ 55 & Exh. K. The letter directed plaintiffs to immediately
28 "cease doing business under Obopay licenses or otherwise conducting business as an

1 agent of Obopay," and further advised plaintiffs of the termination of the Agent
2 Agreement, effective July 3, 2013. FAC Exh. K.

3 In the same letter, Obopay and Realini notified MHP-UK that they were rescinding
4 the Option Agreement "because, among other things, Obopay was fraudulently induced
5 into entering into such Option Agreement by the materially false and/or misleading
6 statements, and/or the omission of material information" by MHP-UK and Payza. Id.

7 Plaintiffs allege that Realini and Obopay never returned or offered to return the
8 \$400,000 paid on February 4, 2013, for the rescinded Option Agreement, or the \$1
9 million MHP-UK was supposed to recover upon exercise of the option, or the \$1.25
10 million redemption price for the preferred shares of Obopay stock, or the \$4 million in
11 customer funds transferred to defendants on April 10, 2013. FAC ¶¶ 56-58.

12 Plaintiffs filed the original complaint in this action on March 25, 2015, alleging
13 causes of action for breach of fiduciary duty (against Realini, Robinson, Martin, and
14 ACS); negligence (against all defendants); breach of contract (Agent Agreement, Stock
15 Agreement, and Option Agreement) and breach of the implied covenant (against Realini
16 and Obopay); fraud and deceit (against all defendants), rescission and restitution (against
17 all defendants), and unfair competition (against all defendants).

18 On March 8, 2017, the court issued an order granting defendants' motions to
19 dismiss, with leave to amend, and denying defendants' motion for a bond ("March 8,
20 2017 Order"). The court dismissed the claims of breach of fiduciary duty, negligence,
21 breach of contract and breach of the implied covenant, fraud and deceit, and unfair
22 business practices with leave to amend, and dismissed the claim of rescission and
23 restitution with prejudice.

24 The court also found that the complaint failed to allege facts sufficient to state a
25 claim against ACS and Omney, Inc. ("Omney" – subsequently dropped from the case)
26 which plaintiffs had asserted under a theory of alter ego liability. The court granted leave
27 to amend, but found it "unlikely that plaintiffs will be able to state a claim" against those
28 defendants; and stated that if plaintiffs did amend the claims against ACS and Omney,

1 and if the court subsequently granted a motion to dismiss, the costs would be shifted to
2 plaintiffs. Finally, the court added that “[n]o new causes of action or parties may be
3 added to the amended complaint unless plaintiffs first obtain leave of court.”

4 Plaintiffs filed the FAC on March 30, 2017, asserting four causes of action:

5 1) a cause of action for breach of contract and breach of the implied
6 covenant, including one "count" by MHP-UK against Realini and Obopay (breach of
7 Option Agreement and breach of Stock Agreement); and one "count" by both plaintiffs
8 against ACS (breach of ACS Agreement), FAC ¶¶ 59-74;

9 2) a cause of action for quasi-contract, by MHP-UK against Realini and
10 Obopay, in connection with the rescinding of the Option Agreement, FAC ¶¶ 75-79;

11 3) a cause of action for breach of fiduciary duty and constructive fraud,
12 including one "count" by MHP-UK against Realini, Robinson, Martin, and ACS, also
13 alleging civil conspiracy among Realini, Robinson, and Martin to deprive MHP-UK of the
14 benefits of the "2013 Transaction;" one "count" by MHP-UK against Realini, arising from
15 the rescinding of the Option Agreement and alleging that Realini caused MHP-UK to
16 "refuse to honor the redemption provisions of the Stock Agreement;" and one "count" by
17 plaintiffs against ACS, based on Robinson (as agent for ACS) having fraudulently
18 induced plaintiffs to pay the \$25,000 charge for the "audit," and based on ACS "causing
19 plaintiffs to pay Obopay's operating expenses with knowledge that defendants had no
20 intention of performing and were conspiring to deprive plaintiffs the benefits of the 2013
21 Transaction," FAC ¶¶ 80-100; and

22 4) a cause of action for fraud and deceit, which includes one "count" by
23 MHP-USA against Martin and Obopay, alleging fraudulent inducement in connection with
24 the March 2012 Agent Agreement; one "count" by MHP-USA against Realini, Robinson,
25 and Martin, alleging fraudulent inducement in connection with MHP-USA's April 10, 2013,
26 transfer of \$4 million in customer funds to "defendants' control;" and one "count" by
27 plaintiffs against Robinson and ACS, in connection with May 2013 invoice for \$25,000 for
28 the "audit" expense which was really a charge for private investigator, FAC ¶¶ 101-123.

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DISCUSSION

2 A. Legal Standard

3 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests for the
4 legal sufficiency of the claims alleged in the complaint. Ileto v. Glock, 349 F.3d 1191,
5 1199-1200 (9th Cir. 2003). A pleading must contain a "short and plain statement of the
6 claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). While a
7 complaint does not need detailed factual allegations, "a plaintiff's obligation to provide the
8 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a
9 formulaic recitation of the elements of a cause of action will not do." Bell Atl. Corp. v.
10 Twombly, 550 U.S. 544, 555 (2007).

11 A complaint "must contain sufficient factual matter . . . to state a claim to relief that
12 is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). A claim is facially
13 plausible when it "allows the court to draw the reasonable inference that the defendant is
14 liable for the misconduct alleged." Id. "[F]actual allegations must be enough to raise a
15 right to relief above the speculative level." Twombly, 550 U.S. at 555.

16 In considering whether the complaint states a claim, the court accepts as true all of
17 the factual allegations contained in the complaint. Iqbal, 556 U.S. at 1949; see also
18 Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322 (2007). However, legal
19 conclusions are "not entitled to the assumption of truth." Twombly, 550 U.S. at 555. Nor
20 is the court required to "accept as true allegations that contradict matters properly subject
21 to judicial notice or by exhibit" or "allegations that are merely conclusory, unwarranted
22 deductions of fact, or unreasonable inferences." In re Gilead Scis. Sec. Litig., 536 F.3d
23 1049, 1055 (9th Cir. 2008) (quotations and citations omitted). Where dismissal is
24 warranted, it is generally without prejudice, unless it is clear the complaint cannot be
25 saved by any amendment. Sparling v. Daou, 411 F.3d 1006, 1013 (9th Cir. 2005).

26 Review is generally limited to the contents of the complaint, although the court can
27 also consider a document on which the complaint relies if the document is central to the
28 claims asserted in the complaint, and no party questions the authenticity of the

1 document. See Sanders v. Brown, 504 F.3d 903, 910 (9th Cir. 2007). The court may
2 consider matters that are properly the subject of judicial notice, Knievel v. ESPN, 393
3 F.3d 1068, 1076 (9th Cir. 2005); Lee v. City of L.A., 250 F.3d 668, 688-89 (9th Cir. 2001),
4 and may also consider exhibits attached to the complaint, see Hal Roach Studios, Inc. v.
5 Richard Feiner & Co., Inc., 896 F.2d 1542, 1555 n.19 (9th Cir. 1989), and documents
6 referenced extensively in the complaint and documents that form the basis of a the
7 plaintiff's claims. See No. 84 Emp'r-Teamster Jt. Counsel Pension Tr. Fund v. Am. W.
8 Holding Corp., 320 F.3d 920, 925 n.2 (9th Cir. 2003).

9 Finally, in actions alleging fraud, “the circumstances constituting fraud or mistake
10 shall be stated with particularity.” Fed. R. Civ. P. 9(b). Falsity must be pled with
11 specificity, including an account of the “time, place, and specific content of the false
12 representations as well as the identities of the parties to the misrepresentations.” Swartz
13 v. KPMG LLP, 476 F.3d 756, 764 (9th Cir. 2007) (citations omitted); see also Sanford v.
14 MemberWorks, Inc., 625 F.3d 550, 558 (9th Cir. 2010) (citation and quotation omitted).
15 In addition, the plaintiff must do more than simply allege the neutral facts necessary to
16 identify the transaction; he must also explain why the disputed representation was untrue
17 or misleading at the time it was made. Yourish v. Calif. Amplifier, 191 F.3d 983, 992-93
18 (9th Cir. 1999).

19 B. Defendants' Motions

20 Realini, Robinson, Martin, and Obopay, joined by ACS, argue that the claims
21 asserted against them in the FAC should be dismissed pursuant to Rule 12(b)(6), for
22 failure to state a claim. In a separate motion, ACS argues that the claims asserted
23 against it should also be dismissed for failure to state a claim, and that the court should
24 award sanctions against plaintiffs for filing a frivolous claim.

25 1. Breach of contract and breach of the implied covenant

26 The first cause of action for breach of contract and breach of the implied covenant
27 of good faith and fair dealing is alleged by plaintiffs against Obopay, Realini, and ACS.
28 Plaintiffs allege two "counts" under this cause of action – one by MHP-UK against Realini

1 and Obopay, asserting breach of the Option Agreement and breach of the Stock
2 Agreement, and a second by both plaintiffs against ACS, asserting breach of the "ACS
3 Agreement."¹ Defendants argue that the FAC fails to state a claim for breach of contract
4 or breach of the implied covenant under either "count."

5 The elements of a claim of breach of contract under California law are (1) the
6 existence of a contract, (2) plaintiff's performance or excuse for nonperformance, (3)
7 defendant's breach, and (4) damages to plaintiff as a result of the breach. Buschman v.
8 Anesthesia Bus. Consultants LLC, 42 F.Supp.3d 1244, 1250 (N.D. Cal. 2014); CDF
9 Firefighters v. Maldonado, 158 Cal. App. 4th 1226, 1239 (2008).

10 In addition, every contract possesses an implied covenant of good faith and fair
11 dealing in which "neither party will do anything which will injure the right of the other to
12 receive the benefits of the agreement." Foley v. Interactive Data Corp., 47 Cal. 3d 654,
13 684 (1988). The scope of the implied covenant depends on the purposes and express
14 terms of the contract. Carma Developers, Inc. v. Marathon Dev. Calif., Inc., 2 Cal. 4th
15 342, 373 (1992). The elements of a claim of breach of the implied covenant are (1) the
16 parties entered into a contract; (2) the plaintiff fulfilled its obligations under the contract;
17 (3) any conditions precedent to the defendant's performance occurred; (4) the defendant
18 unfairly interfered with the plaintiff's rights to receive the benefits of the contract; and (5)
19 the plaintiff was harmed by the defendant's conduct. Rosenfeld v. JPMorgan Chase
20 Bank, N.A., 732 F.Supp. 2d 952, 968 (N.D. Cal. 2010).

21 a. First "count"

22 With regard to the first "count," defendants argue that the FAC does not state a
23 claim for breach of the Option Agreement or the Stock Agreement, or for breach of the
24 implied covenant as to either. As to the Option Agreement, plaintiffs allege in the FAC
25 that "Realini and Obopay breached the Option Agreement by rescinding it." FAC ¶ 65.
26

27 ¹ The court notes that while plaintiffs have pled breach of the ACS Agreement in the FAC
28 as one "count" of the cause of action for breach of contract, and thus have arguably not
added it as a new cause of action, there was no mention of the ACS Agreement in the
original complaint and no claim of breach of contract against ACS.

1 Defendants assert that neither Realini nor Obopay rescinded the Agreement because
2 they did not comply with the actions required to effectuate a rescission of a contract
3 under California law – in particular, they did not “restore to [MHP-UK] everything of value
4 which [they] received . . . under the contract or offer to restore the same upon condition
5 that [MHP-UK] do likewise[,]” as required under Cal. Civ. Code § 1691. And, they add,
6 because the Agreement was not rescinded, plaintiffs could still have exercised the option.

7 In addition, defendants contend, plaintiff's performance or excuse for
8 nonperformance is an essential element of a claim for breach of contract. Here, they
9 argue, while MHP-UK includes an allegation that plaintiffs “performed all their obligations
10 under each of these contracts except where performance was excused,” FAC ¶ 64, it
11 does not allege any facts supporting this claim. Most importantly, they assert, MHP-UK
12 does not allege the most important fact of performance under an Option Agreement –
13 that it ever exercised the option. They contend that without exercise of the option, MHP-
14 UK cannot complain that either Realini or Obopay breached the Option Agreement.

15 As to the Stock Agreement, plaintiffs allege that Realini “caused Obopay to breach
16 the Stock Agreement by refusing to tender the redemption price[.]” FAC ¶ 65.
17 Defendants assert, however, that Realini was not a party to the Stock Agreement and
18 thus could not have breached it. Moreover, they note, plaintiffs have failed to allege facts
19 showing which provisions of the Agreement were breached, or how, as the court
20 previously directed. They also assert that the FAC does not point to any provision of the
21 Stock Agreement that required “redemption,” and under what circumstances.

22 Defendants argue further that the FAC does not state a claim for breach of the
23 implied covenant, but instead simply recites the legal principle that “[u]nder California law,
24 an implied covenant of good faith and fair dealing is read into every contract.” FAC ¶ 63.
25 Defendants assert that plaintiffs have alleged no facts sufficient to state a claim of breach
26 of the implied covenant, and argue that if plaintiffs are relying on the same behavior as
27 alleged in support of the breach of contract claim, the breach of implied covenant claim
28 should be dismissed as superfluous.

1 In opposition, plaintiffs argue that the FAC states a claim on behalf of MHP-UK
2 against Realini and Obopay for breach of the Option Agreement and its implied covenant
3 of good faith and fair dealing (which they do not separately address). They assert that
4 the FAC adequately alleges that Realini and Obopay breached the Option Agreement
5 when Realini issued the rescission letter, because this act had the intent and effect of
6 destroying the entire object and purpose of the “2013 Transaction.” See FAC ¶¶ 60-65.

7 In the FAC, plaintiffs allege that the intent of the “2013 Transaction” was that MHP-
8 UK would take ownership of 9% of Obopay immediately and would acquire the remaining
9 91% upon exercise of the option, thereby recovering the \$1 million that defendants had
10 allegedly agreed to hold for its benefit in a segregated bank account. FAC ¶ 62.
11 Alternatively, they assert, if MHP-UK elected not to exercise the option, it would have the
12 right to redeem its 9% share of the stock for \$1.25 million. Id.

13 Plaintiffs contend that Realini understood that the object of the transaction was to
14 deliver Obopay’s MTL assets to MHP-UK. They assert that Realini also knew that MHP-
15 UK had invested in the transaction based on the agreement that it would recover \$1
16 million in a segregated Obopay bank account upon exercise of its option. They contend
17 that Realini knew she was being paid \$10,000/mo. to do “virtually nothing” other than
18 temporarily hold a majority interest in Obopay until such time as MHP-UK could exercise
19 its option. They claim that Realini’s conduct breached the implied covenant of good faith
20 and fair dealings because it had the intent and effect of frustrating MHP-UK’s rights to
21 receive the benefits of the “2013 Transaction” as “embodied in” the Option Agreement.

22 With regard to the claim of breach of the Option Agreement, the court finds that
23 the motion must be DENIED. At the time Realini notified plaintiffs of the purported
24 rescission, the Option Agreement was a unilateral contract because Obopay and Realini
25 had merely offered MHP-UK the right to purchase the stock. MHP-UK paid to keep the
26 offer open for a specified period of time, but could “accept” the offer only by exercising
27 the option. In other words, performance by Realini and Obopay was required only at the
28 point that MHP-UK exercised the option. Until the option was exercised, the contract was

unilateral.

However, defendants' purported rescission was ineffective because they failed to return the consideration. Whether framed as a claim of breach of contract or a claim of breach of the implied covenant, the cause of action as it relates to the Option Agreement raises factual issues that cannot be resolved on a Rule 12(b)(6) motion. Thus, the court finds that for purposes of the present motion, the claim may proceed.

However, this cause of action does fail to state a claim for breach of the Stock Agreement, and the motion is GRANTED as to that part of the claim. In addition, by failing to oppose defendants' motion, plaintiffs have effectively abandoned that part of the claim.

b. Second “count”

In the second “count,” plaintiffs allege that in the ACS Agreement, ACS “agreed to manage Obopay operations and protect plaintiffs’ interests in the 2013 Transaction.” FAC ¶ 68 & Exh. H. Specifically, plaintiffs assert that ACS “agreed to provide transparent and honest accounting for the Obopay expenses that plaintiffs agreed to pay during the transition period.” *Id.*

Plaintiffs allege that ACS breached the ACS Agreement when Robinson engaged with other defendants in the conspiracy to "deprive plaintiffs of the benefits of the 2013 Transaction, including causing Obopay to make allegations against plaintiffs to DHS and to hire an investigator to pursue those investigations privately." FAC ¶ 69. They also assert ACS breached the Agreement "by continuing to collect money for Obopay's operational expenses from plaintiffs with knowledge that defendants did not intend to perform the 2013 Transaction" as well as "when it charged the \$25,000 cost of the private investigator to plaintiffs under the false pretense that it was an Obopay audit expense." FAC ¶¶ 70-71.

ACS argues separately that the FAC does not plead facts sufficient to state a claim for breach of contract, because the ACS Agreement (FAC Exh. H) is not an enforceable contract. Here, ACS argues, there is no indication from the allegations in the

1 FAC or from the ACS Agreement that such mutual assent existed.

2 ACS asserts that the ACS Agreement is not signed, and there is no other
3 manifestation of assent; that neither the FAC nor the purported Agreement identifies
4 which plaintiff allegedly entered into the Agreement; and that the terms of the purported
5 Agreement are not sufficiently definite to create enforceable obligations. ACS also
6 contends that the FAC alleges no facts showing breach of the purported Agreement
7 under any of the three theories of breach set forth in FAC ¶¶ 69-71.

8 In opposition, plaintiffs argue that the ACS Agreement is an enforceable contract,
9 that the FAC adequately alleges breach of that contract, and that the FAC adequately
10 alleges breach of the implied covenant. With regard to the enforceability of the
11 Agreement, plaintiffs simply assert that “[t]he ACS Agreement speaks for itself,” and that
12 ACS’s arguments concerning the enforceability of the Agreement “contravene the fact
13 allegations of the FAC and the content of the Agreement itself.” See Pltfs’ Opp. at 12.

14 Plaintiffs also claim that the FAC “adequately alleges that it was Robinson, ACS’s
15 sole agent and operator at the time, who prepared this document,” pointing to allegations
16 in FAC ¶¶ 31-32, 37-46, and also pointing to the purported Agreement itself (Exh. H).
17 Finally, plaintiffs contend that the terms of the Agreement are not vague, as ACS claims,
18 when they are considered “in the context of the 2013 Transaction[,]” and argue that the
19 fact that Robinson did not specify which of the two plaintiffs were parties to the
20 Agreement simply suggests that he was “promising the same thing to both of them, or
21 saw no meaningful distinction between them.” Id.

22 The court finds that the motion to dismiss the breach of contract claim against
23 ACS must be GRANTED. The purported ACS Agreement is not an enforceable contract,
24 and the FAC does not allege facts showing breach. To form a contract, the parties must
25 provide mutual assent. See Cal. Civ. Code §§ 1550, 1565; Bustamante v. Intuit, Inc., 141
26 Cal. App. 4th 199, 207-08 (2006). If there is no manifestation of mutual assent, there is
27 no contract. See Specht v. Netscape Commn’s Corp., 306 F.3d 17, 28-29 (2d Cir. 2002)
28 (applying California law). The FAC does not identify which of the two plaintiffs entered

1 into the purported Agreement, but alleges only that "[b]oth plaintiffs entered into or were
2 intended beneficiaries of the ACS Agreement." See FAC ¶ 60.

3 However, a review of the purported ACS Agreement shows no manifestation of
4 assent by ACS or by either plaintiff. The purported Agreement makes no mention of
5 MHP-UK or MHP-USA, referring only to "MH Pillars" and "Payza." See FAC Exh. H.
6 Because the FAC does not identify the entity to which ACS allegedly owed contractual
7 duties, plaintiffs cannot properly plead the existence of a contract. Moreover, the
8 purported Agreement is unsigned, and does not even include a signature block.

9 Nor does the FAC plead facts relating to contract formation that would indicate
10 mutual assent – for example, facts about who prepared the purported Agreement, who
11 approved it, or when it was allegedly approved or executed. Plaintiffs claim that ¶¶ 31-32
12 and 37-46 of the FAC adequately allege that Robinson prepared the purported
13 Agreement. However, as noted below, the paragraphs of the FAC cited by plaintiffs do
14 not in fact say that the purported Agreement was prepared by Robinson, and certainly
15 there are no allegations showing that it was approved or executed, or when.

16 FAC ¶ 31 alleges that Robinson was the agent of ACS; ¶ 32 alleges that Robinson
17 represented that he was acting on behalf of ACS; ¶ 37 alleges that ACS and Robinson
18 "developed and implemented" a "transactional structure" that resulted in the Stock
19 Agreement and the Option Agreement; ¶ 38 alleges that this "transaction" included the
20 ACS Agreement; ¶ 39 alleges that in this Agreement, ACS "agreed" to provide certain
21 services "through Robinson;" ¶ 40 alleges that the Stock Agreement, the Option
22 Agreement, and the ACS Agreement were all part of the "2013 Transaction;" ¶ 41 alleges
23 that "Robinson/ACS" represented to "plaintiffs" that "he had structured the 2013
24 Transaction with the assistance of legal counsel to achieve the goals of making Obopay a
25 fully licensed money transmitter in the US" and "of delivering ownership of Obopay to
26 MHP-UK . . . where it could be merged into MHP-USA;" ¶ 42 alleges that MHP-USA
27 wired \$1.65 million to Obopay "in reliance on the above representations by
28 Robinson/ACS;" ¶ 43 alleges that MHP-USA, "pursuant to the ACS Agreement," then

1 began paying Obopay's operating expenses; ¶ 44 alleges that, also "pursuant to the ACS
2 Agreement," ACS moved the Obopay operations to its office;" ¶ 45 alleges that the day-
3 to-day operations consisted of two Obopay compliance staff employees; and ¶ 46 alleges
4 that Realini's only role in Obopay was to "hold its equity and sit on its board," that
5 "Robinson/ACS acted as president."

6 The purported Agreement consists of a vague list of potential terms, some of
7 which appear to relate to ACS, and some of which do not, but none of which are
8 enforceable. For example, ¶ 1 of the purported Agreement refers to Robinson serving as
9 Obopay's compliance board director, and states that Robinson "will vote and protect the
10 interests of MH Pillars." FAC Ex. H ¶ 1(b). However, the FAC pleads no facts showing
11 that Robinson ever served on Obopay's board or as its president, as seemingly required
12 under the purported Agreement. Plaintiffs simply allege that "Robinson/ACS acted as
13 president," with a citation to the purported ACS Agreement. See FAC ¶ 46 (citing Exh.
14 H). In addition, neither the purported Agreement nor the FAC indicates what is meant by
15 "vot[ing] and protect[ing] the interests of MH Pillars," or explains which of plaintiffs' vague
16 "interests" Robinson or ACS was allegedly promising to protect. These generalized
17 promises are insufficiently definite to impose enforceable obligations on ACS.

18 Paragraph 2 is also too indefinite to create enforceable obligations. While it
19 appears to contain somewhat less vague promises by ACS related to services Robinson
20 would perform as president of Obopay, it is immediately followed by a list of "Possible
21 changes" to some of those promises. See FAC Ex. H, ¶ 2. The fact that this unsigned,
22 undated "Agreement" contains a list of changes to the obligations ACS is allegedly
23 undertaking pursuant to the Agreement simply underscores the unenforceability of those
24 alleged obligations.

25 In addition, the FAC pleads no facts showing breach of the purported ACS
26 Agreement, under any of plaintiffs' three theories. Under the first theory, ACS (acting
27 through Robinson) allegedly breached its agreement to "protect" plaintiffs' "interests" in
28 the "2013 Transaction," when Robinson, acting as ACS's agent and in concert with the

1 other individual defendants, caused “Obopay to make allegations against plaintiffs to
2 DHS and to hire an investigator to pursue those allegations privately.” FAC ¶¶ 68-69.

3 However, this claim is based on the alleged collective conduct of all three
4 individual defendants, none of whom were alleged to be parties to the purported ACS
5 Agreement. Moreover, the purported ACS Agreement is not referenced in the Stock
6 Agreement or the Option Agreement, and neither the Stock Agreement nor the Option
7 Agreement is mentioned in the purported ACS Agreement – even though plaintiffs claim
8 the ACS Agreement formed one part of the “2013 Transaction,” with the other two
9 Agreements forming the other parts. See FAC ¶ 61.²

10 Even if the allegations could be interpreted to apply to Robinson, the FAC would
11 still fail to allege a breach. The suggestion that Robinson’s alleged participation in the
12 hiring of Deloitte and subsequent reporting to DHS violated ACS’s alleged promise to
13 “protect” plaintiffs’ interests is without merit, as that interpretation would effectively
14 impose a contractual duty on ACS to conceal any alleged illegal activity of plaintiffs so as
15 not to breach its obligation to protect “MH Pillars.” Such a duty would be illegal, against
16 public policy, and unenforceable, see Cal. Civ. Code §§ 1550, 1608, and would directly
17 contradict Robinson’s alleged duties as Obopay’s compliance board director, thus
18 causing a breach of a different alleged promise in the purported ACS Agreement.

19 Under the second theory, plaintiffs allege a breach based upon the allegation that
20 ACS continued “to collect money for Obopay’s operational expenses” during the
21 transitional period. FAC ¶ 70; see also FAC ¶ 43. Most of these expenses would have
22 been associated with ensuring Obopay’s compliance with applicable laws, which was the
23 primary purpose of the purported ACS Agreement as illustrated by its alleged “terms.”
24 See FAC Exh. H ¶ 1 (Robinson to serve as compliance board director); id. ¶ 2(b)

25
26 ² The court notes in addition that the Stock Agreement and the Option Agreement,
27 separately, each include an integration clause. See FAC Exh. F ¶ 6.4; Exh. G ¶ 6.5(a).
28 In California, an integration clause offers persuasive evidence that the parties intended
the writing to be a final expression of their agreement as to the stated subject matter.
See Sussex Fin. Enters., Inc. v. Bayerische Hypo-Und Vereinsbank AG, 460 Fed. Appx.
709, 711 (9th Cir. 2011).

1 (Robinson to manage compliance officer); id. ¶ 2(c) (Robinson to ensure that Obopay is
2 in good standing); id. ¶ 2(e) (Robinson to recruit compliance officer for long term role); id.
3 ¶ 2(f) (Robinson to represent Obopay to state regulators); and id. ¶ 2(g) (Robinson to
4 serve as compliance officer if Martin leaves).

5 However, according to the FAC, it was Obopay, not ACS, that was supposedly
6 responsible for invoicing “MH Pillars” for Obopay’s expenses. See FAC Exh. H ¶ 2(h).
7 Indeed, the FAC alleges that MHP-USA began paying Obopay’s expenses after January
8 31, 2013, during which time Obopay was in operation, including having its compliance
9 staff working to renew MTLs and re-apply for lapsed or abandoned MTLs, and having
10 weekly meetings with plaintiffs. See FAC ¶¶ 44-45, 51. Moreover, the FAC pleads no
11 facts showing that Obopay did not incur the operational expenses for which it invoiced
12 plaintiffs.

13 Under the third theory, plaintiffs allege breach based on the \$25,000 charge from
14 Deloitte. See FAC ¶ 71. This charge does not constitute a breach of the purported ACS
15 Agreement. To the contrary, hiring the accounting firm Deloitte to investigate financial
16 matters related to plaintiffs’ operations arguably furthered the primary purpose of the
17 purported ACS Agreement, which was to ensure Obopay’s compliance with applicable
18 laws and regulations. Thus, the hiring of Deloitte was consistent with this alleged
19 obligation to maintain compliance at Obopay. In short, plaintiffs fail to allege facts
20 showing how ACS’s alleged involvement with the \$25,000 charge could be found to
21 breach a promise made by ACS under the purported ACS Agreement.

22 The allegations relating to the \$25,000 charge are also lacking in specificity.
23 Plaintiffs begin by alleging that the individual defendants all charged “plaintiffs” for the
24 \$25,000 auditing expense to Deloitte, which plaintiffs refer to as a “private investigator.”
25 See FAC ¶ 49(b). Later, plaintiffs claim that ACS charged “plaintiffs” for the expense.
26 FAC ¶ 71. Later still, they claim that “Robinson, as agent for ACS, in connection with the
27 ACS Agreement, caused Obopay to transmit an invoice to plaintiffs that included” the
28 \$25,000 charge. FAC ¶ 116. In addition, they allege that the “plaintiffs” were charged

1 with the \$25,000, FAC ¶¶ 49(b), 71, 116, but then also claim that MHP-USA actually paid
2 the \$25,000, FAC ¶¶ 49(c), 119.

3 Finally, the claim of breach of the implied covenant must be dismissed, because
4 the FAC does not allege facts sufficient to support the required elements (and does not
5 even attempt to allege those elements).

6 2. Quasi-contract

7 The second cause of action for quasi-contract is asserted by MHP-UK against
8 Realini and Obopay, in connection with the rescinding of the Option Agreement, seeking
9 restitution and "consequential" damages.

10 Defendants contend that the quasi-contract claim should be dismissed for failure
11 to state a claim, and, more importantly, because it is a new cause of action added to the
12 FAC in contravention of the court's directive in the March 8, 2017, Order that plaintiffs
13 could assert no new causes of action in the amended complaint without leave of court.

14 The elements of a claim of quasi-contract or unjust enrichment are (1) a
15 defendant's receipt of a benefit and (2) unjust retention of that benefit at the plaintiff's
16 expense. Peterson v. Cellco P'ship, 164 Cal. App. 4th 1583, 1593 (2008). Unjust
17 enrichment is an equitable claim that sounds in implied or quasi-contract. See Paracor
18 Fin., Inc. v. Gen. Elec. Capital Corp., 96 F.3d 1151, 1167 (9th Cir.1996). "The doctrine
19 applies where plaintiffs, having no enforceable contract, nonetheless have conferred a
20 benefit on defendant which defendant has knowingly accepted under circumstances that
21 make it inequitable for the defendant to retain the benefit without paying for its value."
22 Hernandez v. Lopez, 180 Cal. App. 4th 932, 938 (2009).

23 Defendants contend that plaintiffs have made no effort to plead any facts showing
24 an entitlement to relief under a quasi-contract theory. Instead, they assert, the quasi-
25 contract cause of action merely states conclusions of law, without supporting facts.
26 Moreover, they argue, this case could not be governed by quasi-contract when there are
27 several express contracts that govern the relationship of the parties.

28 In opposition, plaintiffs first contend that they did not intentionally violate the

1 court's instruction in the prior order with regard to amending the complaint. In the original
2 complaint, plaintiffs asserted a cause of action for "rescission and restitution." In the
3 March 8, 2017, Order, the court dismissed the rescission claim because in California,
4 rescission is a remedy, not a cause of action, and restitution is not a stand-alone cause of
5 action. The court added that "[r]estitution can be sought as a remedy in a quasi-contract
6 cause of action." See Order at 15 (citations omitted).

7 Plaintiffs now claim that they interpreted this as an invitation to allege a claim of
8 quasi-contract in the FAC, and argue that the FAC states an "alternative claim" against
9 Realini for quasi-contract based on her unilateral rescission of the Option Agreement.
10 However, the Order also clearly stated that "[n]o new causes of action or parties may be
11 added to the amended complaint unless plaintiffs first obtain leave of court." Order at 26.

12 The court finds that the motion to dismiss the quasi-contract cause of action must
13 be GRANTED. First, and most importantly, plaintiffs failed to seek leave to add this claim
14 to the amended complaint, in contravention of the March 8, 2017, Order. In addition,
15 plaintiffs' entire case is based on the claim that express contracts governed the parties'
16 relationship, and "a quasi-contract cause of action does not lie where . . . express binding
17 agreements exist and define the parties' rights." See Cal. Med. Ass'n, Inc. v. Aetna U.S.
18 Healthcare of Cal., Inc., 94 Cal. App. 4th 151, 172 (2001). While it is true that Rule 8
19 allows a plaintiff to plead "alternatively or hypothetically," see Fed. R. Civ. P. 8(d)(2), the
20 court previously directed that plaintiffs could add no new claims without leave of court,
21 and it is undisputed that the quasi-contract cause of action is a new claim and that
22 plaintiffs did not seek leave to add it to the FAC.

23 3. Breach of fiduciary duty and constructive fraud

24 In the third cause of action for breach of fiduciary duty and constructive fraud,
25 plaintiffs assert three "counts" against all defendants except Obopay. Constructive fraud
26 is a unique species of fraud applicable only to a fiduciary or confidential relationship.
27 Assilzadeh v. Cal. Fed. Bank, FSB, 82 Cal. App. 4th 399, 415 (2000) (citation and
28 quotation omitted). The claim of constructive fraud alleged here is a new claim, not

1 previously asserted by plaintiffs. As noted above, with regard to the claim for quasi-
2 contract, the court previously directed that in amending the complaint, plaintiffs must seek
3 leave of court before adding any new claims or parties. Plaintiffs did not seek leave to
4 add this cause of action. Accordingly, the motion to dismiss the constructive fraud claim
5 is GRANTED.

6 As for the claim of breach of fiduciary duty, the first "count" is a claim by MHP-UK
7 in its capacity as a minority shareholder, alleging civil conspiracy among Realini, Martin,
8 and Robinson to deprive MHP-UK of the benefits of the "2013 Transaction," and alleging
9 respondeat superior liability against ACS (based on Robinson's alleged role as ACS's
10 agent). FAC ¶¶ 85-91.

11 The second "count" is a claim by MHP-UK against Realini, based on her
12 "rescinding the Option Agreement," and "causing MHP-UK to refuse to honor the
13 redemption provisions of the Stock Agreement." FAC ¶¶ 92-93.

14 The third "count" is a claim alleging that ACS breached the fiduciary duty it owed
15 "plaintiffs" in connection with the purported ACS Agreement, when Robinson (as agent of
16 ACS) fraudulently induced plaintiffs to pay the \$25,000 audit charge, and when it caused
17 plaintiffs to pay Obopay's operating costs with knowledge that defendants did not intend
18 to perform the "2013 Transaction." FAC ¶¶ 94-97.

19 Defendants contend that the FAC fails to state a cause of action for breach of
20 fiduciary duty. The elements of a cause of action for breach of fiduciary duty are
21 (1) existence of a fiduciary duty; (2) breach of the fiduciary duty; and (3) damage
22 proximately caused by the breach. Stanley v. Richmond, 35 Cal. App. 4th 1070, 1086
23 (1995). There must be an adequate showing of each of these elements in order to plead
24 a cause of action for breach of fiduciary duty. See Yamauchi v. Cotterman, 84 F.Supp.
25 3d 993, 1016 (N.D. Cal. 2015); City of Atascadero v. Merrill Lynch, Pierce, Fenner &
26 Smith, Inc., 68 Cal. App. 4th 445 (1998).

27 Under California law, a fiduciary relationship is a special circumstance in which the
28 fiduciary "assumes duties beyond those of mere fairness and honesty" and "must

1 undertake to act on behalf of the beneficiary, giving priority to the best interest of the
2 beneficiary.” Comm. On Children's Television, Inc. v. Gen. Foods Corp., 35 Cal.3d 197,
3 222 (1983). “The obligation to put the interests of the other party first is why a fiduciary
4 relationship generally does not arise out of ordinary arms-length business dealings. In a
5 typical business contract or relationship, one party does not commit to act in the other
6 party's best interest rather than in its own.” World Surveillance Grp., Inc. v. La Jolla
7 Cover Investors, Inc., 66 F.Supp. 3d 1233, 1235 (N.D. Cal. 2014). Thus, a fiduciary duty
8 will be found only where an individual or entity has knowingly undertaken that high duty
9 or when the law imposes the duty in special relationships such as agency, partnership, or
10 joint venture. Id.

11 Under a conspiracy theory of liability, each member of the conspiracy may be held
12 jointly liable as a tortfeasor, even though he or she may not have participated directly in
13 the underlying tort. Richard B. LeVine, Inc. v. Higashi, 131 Cal. App. 4th 566, 574
14 (2005). However, there is no separate tort of civil conspiracy and no action for
15 conspiracy to commit a tort unless the underlying tort is committed and damage results
16 therefrom. Unruh v. Truck Ins. Exch., 7 Cal. 3d 616, 631 (1972). To plead civil
17 conspiracy, a plaintiff must allege facts showing “(1) formation and operation of the
18 conspiracy and (2) damage resulting to plaintiff (3) from a wrongful act done in
19 furtherance of the common design.” Rusheen v. Cohen, 37 Cal. 4th 1048, 1062 (2006).

20 a. First “count”

21 The first “count” is asserted against Realini, Martin, Robinson, and ACS. Plaintiffs
22 allege that Realini, Martin, and Robinson breached their fiduciary duties toward MHP-UK
23 (a) by engaging in a conspiracy to deprive MHP-UK of the benefits of the “2013
24 Transaction,” including by causing Obopay to make allegations about plaintiffs to DHS
25 and hiring an investigator to pursue those allegations privately, for which they assert ACS
26 is also liable under a theory of respondeat superior, FAC ¶¶ 86, 90; (b) by deceiving
27 “plaintiffs” into transferring \$4 million to their control under false pretenses, FAC ¶ 87; and
28 (c) by failing to truthfully disclose their actions, intentions, and concerns regarding the

1 MTL compliance issues, falsely acting as though they intended to perform the 2013
2 Transaction in good faith, and continuing to have their salaries and Obopay's expenses
3 paid by the plaintiffs under those circumstances, FAC ¶¶ 88, 91.

4 Defendants contend that this "count" should be dismissed because there is no
5 fiduciary duty requiring corporate officers to refrain from investigating and reporting
6 unlawful conduct, and indeed, that imposing such a fiduciary duty would be against
7 California public policy; because defendants' communications to DHS are privileged
8 under Civil Code § 47(b) and cannot serve as the basis for tort liability; because this
9 claim alleging "false pretenses" and failure to "truthfully disclose" actions, intentions, and
10 concerns – sounds in fraud and must be pled with particularity, which plaintiffs have not
11 done; and because MHP-UK has failed to plead facts supporting the elements of
12 conspiracy.

13 ACS argues in its separate motion that the FAC fails to state a claim against it
14 based on the alleged conspiracy of Realini, Martin, and Robinson to deprive MHP-UK of
15 the benefits of the "2013 Transaction" by hiring Deloitte to investigate plaintiffs and then
16 reporting plaintiffs to DHS. ACS contends that these allegations are nearly identical to
17 those that form the basis of plaintiffs' claim against ACS for breach of the purported ACS
18 Agreement, and should be dismissed for the same reason.

19 As for the allegation that ACS is liable through a theory of respondeat superior
20 based entirely upon Robinson's actions, ACS contends that because plaintiffs do not
21 allege that Robinson actually served on Obopay's board or as its president after the 2013
22 Transaction, they allege no fiduciary duty owed to MHP-UK by Robinson that could be
23 imputed to ACS. Moreover ACS asserts, had plaintiffs alleged such a duty, it could not
24 be imposed on ACS because the FAC only alleges in conclusory fashion that Robinson
25 was acting as ACS's agent, see FAC ¶ 90, which ACS argues is insufficient. Indeed,
26 ACS asserts, plaintiffs make no effort to establish how Robinson could simultaneously be
27 acting within the scope of his agency with ACS and also as a board member and officer
28 of Obopay owing fiduciary duties to MHP-UK.

1 ACS argues further that even if plaintiffs had adequately alleged that Robinson
2 owed them a fiduciary duty that also was imputed to ACS, the fiduciary duty claim would
3 still fail for a lack of breach. ACS contends that the hiring of Deloitte and the reporting of
4 plaintiffs to DHS would have been consistent with any fiduciary duties owed to all Obopay
5 shareholders, and that MHP-UK's interests should have aligned with the remaining
6 shareholders, and should have included ensuring that Obopay's operations were
7 compliant with all applicable laws.

8 In opposition, plaintiffs argue that the FAC adequately alleges that Realini, Martin,
9 and Robinson breached fiduciary duties owed to MHP-UK. They contend that they have
10 pled facts showing that Realini breached fiduciary duties owed to MHP-UK as the
11 majority shareholder and nominal "chief officer" of Obopay, of which MHP-UK was a
12 minority shareholder, because she failed to disclose that she suspected illegal activities
13 and felt obliged to report them to law enforcement, and because she "deceived" MHP-UK
14 into sending Obopay \$4 million under the pretext that this would cure the compliance
15 issues, when in fact she never intended to go forward with the "2013 Transaction,"
16 including the Option Agreement.

17 Plaintiffs assert they have pled facts showing that Martin breached fiduciary duties
18 owed to MHP-UK as an officer of Obopay, because he undertook to act for plaintiffs in
19 connection with the "2013 Transaction," and because he joined in with Realini and
20 Robinson at the March 28, 2013 Obopay/Payza Compliance Committee meeting in
21 falsely representing that plaintiffs needed to transfer the \$4 million to Obopay to ensure
22 regulatory compliance.

23 Plaintiffs contend that they have also pled facts showing that Robinson breached
24 fiduciary duties owed to MHP-UK as an officer of Obopay, see FAC ¶ 39 (citing provision
25 of purported ACS Agreement, stating that Robinson would "serve on Obopay board" and
26 would "serve as president of Obopay") of which MHP-UK was a minority shareholder,
27 because he knowingly undertook to act on behalf of plaintiffs in connection with the "2013
28 Transaction," and because he failed to disclose to plaintiffs that he suspected unlawful

1 activities that he felt obligated to report to law enforcement, see FAC ¶¶ 86-88.

2 Plaintiffs claim that Robinson assured them in a December 2012 exchange of
3 emails that they could place their trust in him with statements such as “[y]ou can certainly
4 set the salaries of the compliance team as they will eventually work for you” and “[w]e will
5 be very transparent about costs.” See FAC, Exh. D. Plaintiffs also assert that Robinson
6 breached his fiduciary duty by intentionally deceiving MHP-UK into sending Obopay \$4
7 million under the false pretext that this would cure the defendants’ regulatory concerns.
8 FAC ¶ 87; see also FAC ¶¶ 52-53.

9 Plaintiffs contend that many of Robinson’s breaches of fiduciary duty fall directly
10 within the ambit of the purported ACS Agreement and, thus, constitute direct breaches of
11 fiduciary duty by ACS as well. They claim that ACS directly promised to “provide”
12 Robinson to serve on the Obopay board and “vote and protect the interests” of MHP, and
13 that it directly promised to do the bookkeeping contemplated by the 2013 Transaction in a
14 manner that “insure[d] [a] transparent view of expenses/books [was] provided to” MHP.
15 FAC Exh. H. Plaintiffs concede that Robinson did not collect a salary during these
16 months, but nonetheless assert that he personally benefitted because his company, ACS,
17 continued to profit from the monthly bookkeeping and administration fees it was charging
18 to MHP-USA. See FAC ¶¶ 43(c)-(d).

19 Plaintiffs point to the allegations in the FAC that “[t]he fiduciary duty imposed in
20 connection with the ACS Agreement required ACS at a minimum to be honest and
21 truthful with respect to the expenses it was charging to plaintiffs,” FAC ¶ 94; that “ACS
22 breached this fiduciary duty to plaintiffs when Robinson, in his capacity as the agent of
23 ACS performing the ACS Agreement, fraudulently induced plaintiffs to pay the \$25,000
24 private investigation charges by misrepresenting it as an audit expense,” FAC ¶ 95; and
25 that “ACS also breached its fiduciary duty by causing plaintiffs to pay Obopay’s operating
26 expenses with knowledge that defendants had no intention of performing and were
27 conspiring to deprive plaintiffs the benefits of the 2013 Transaction, FAC ¶ 96.

28 The motion to dismiss the first “count” as to Realini, Martin, and Robinson is

1 GRANTED. With regard to the Deloitte due-diligence investigation and defendants'
2 report of the results of that report to DHS, there is no fiduciary duty requiring corporate
3 officers to refrain from investigating and truthfully reporting unlawful conduct. Moreover,
4 defendants' communication to DHS was privileged under California Civil Code § 47(b),
5 and cannot serve as the basis for tort liability, because those communications were
6 intended to instigate official governmental investigation into wrongdoing, including police
7 investigations. See Hagberg v. Calif. Fed. Bank FSB, 32 Cal. 4th 350, 360 (2004).

8 Nor have plaintiffs pled fraud with particularity in this "count." For example, they
9 have not alleged any facts supporting the vague allegation that defendants "fail[ed] to
10 affirmatively and truthfully disclose their actions, intentions, and concerns" and that they
11 "falsely acted" like they intended to perform the 2013 Transaction in good faith, as
12 alleged in FAC ¶ 88. To the extent plaintiffs are attempting to allege that defendants
13 never intended to perform under the Stock Agreement and Option Agreement, they do
14 not allege facts sufficient to support such a claim. Additionally, if that is what they are
15 alleging, it is in essence a contract claim, and there are no facts pled in the FAC sufficient
16 to state a claim of conspiracy to breach the contract.

17 As for plaintiffs' claim that Robinson assumed fiduciary duties to them by
18 undertaking to act on their behalf, which they claim is shown by assurances Robinson
19 made via email in December 2012 regarding salaries and transparency of costs when
20 discussing the unrealized transaction in which ACS would have taken ownership of
21 Obopay, those alleged assurances do not create a fiduciary duty under any
22 circumstances, much less when offered in connection with an unconsummated deal, as
23 was the case here.

24 The motion to dismiss the first "count" against ACS is also GRANTED. Plaintiffs
25 claim that Robinson owed MHP-UK fiduciary duties because he served as an officer of
26 Obopay, and assert that these fiduciary duties can be imputed to ACS through principles
27 of respondeat superior. However, the FAC does not plead facts showing breach of
28 fiduciary duty by Robinson. Thus, there can be no respondeat superior liability imposed

1 on ACS based on Robinson's actions.

2 Plaintiffs' argument also fails because Robinson's alleged fiduciary duty flows from
3 his purported service as an Obopay officer. Because he allegedly served as an officer of
4 Obopay under the purported ACS Agreement, any fiduciary duty owed by Robinson
5 would be dependent upon the ACS Agreement. But, as explained above, the purported
6 ACS Agreement is a proposal, not an enforceable agreement, so it cannot serve as the
7 basis for a claim that Robinson served as president, or for imputing Robinson's alleged
8 fiduciary duties onto ACS.

9 In addition, Robinson could not have simultaneously acted as Obopay's president
10 while also acting as ACS's agent. That is, his scope of employment with ACS cannot
11 include acting as the president of Obopay (a different corporation) and allegedly owing
12 fiduciary duties to both Obopay and its shareholders. Plaintiffs allege no facts nor point
13 to any authority supporting the notion that principles of respondeat superior can be
14 stretched to such an extent.

15 As for the assertion that Robinson undertook to act on plaintiffs' behalf pursuant to
16 the purported ACS agreement, which indicated that Robinson would act for plaintiffs'
17 benefit, would vote to protect plaintiffs' interests, and would provide plaintiffs a
18 transparent view of Obopay's expenses, those alleged promises do not evidence special
19 circumstances under which ACS undertook responsibilities beyond mere fairness and
20 honesty. Allegations that one party agreed to "act in the best interests" of the other are
21 insufficient to create a fiduciary duty. See World Surveillance Grp., 66 F.Supp. at 1235.

22 Further, there was no breach of fiduciary duty from the purported ACS
23 Agreement. Even if it were an enforceable contract, it would not create fiduciary
24 obligations in ACS, as it provides no indication that ACS was acting primarily for plaintiffs'
25 benefit, or subordinating its interests to those of plaintiffs.

26 b. Second "count"

27 In the second "count," plaintiffs allege that Realini breached her fiduciary duties
28 towards MHP-UK by rescinding the Option Agreement and by causing Obopay to refuse

1 to honor the redemption provisions of the Stock Agreement, in order to deprive MHP-UK
2 of the value it was supposed to receive from the “2013 Transaction.” FAC ¶ 92.

3 Defendants argue that these claims fail for the same reason that the identical
4 breach of contract claims fail. In addition, defendants assert, it is well-established that
5 conduct amounting to a breach of contract is not also tortious unless the conduct violates
6 an independent duty arising from principles of tort law. Generally, they note, a failure to
7 perform a contract cannot give rise to tort damages.

8 In opposition, plaintiffs argue that Realini as the majority shareholder assumed a
9 fiduciary duty to MHP-UK as the minority shareholder, and that she knowingly undertook
10 to serve in those roles for the purpose of furthering MHP-UK’s interest in the “2013
11 Transaction.” They contend that Realini continued to pretend to be engaged in business
12 as usual with respect to the “2013 Transaction” right up to the moment she rescinded the
13 Option Agreement. Plaintiffs assert that while Realini obtained “nominal ownership and
14 control” of Obopay through the “2013 Transaction,” the fact is that MHP-UK had paid all
15 the consideration she had ostensibly used to purchase it. They claim that in rescinding
16 the option, Realini was using the nominal control of Obopay that MHP-UK had entrusted
17 to her in order to take beneficial ownership of it for herself while also keeping all the
18 consideration MHP-UK had paid for it.

19 In response to defendants’ argument that the rescission cannot be both a breach
20 of contract and a breach of fiduciary duty, plaintiffs respond that a fiduciary duty may
21 arise from a contractual relationship. Indeed, they argue, fiduciary relationships
22 frequently arise based on the contractual intent “to act on behalf of and for the benefit of
23 another.”

24 The court finds that the motion must be GRANTED as to the second “count.”
25 Essentially, plaintiffs are attempting to assert that the rescinding of the Option
26 Agreement, which they have challenged under theories of breach of contract and breach
27 of the implied covenant, was also a breach of fiduciary duty. Conduct amounting to a
28 breach of contract is not also tortious unless the conduct “violates an independent duty

1 arising from principles of tort law.” Applied Equip. Corp. v. Litton Saudi Arabia, Ltd., 7
2 Cal. 4th 503, 514 (1994). Under California law and the economic loss doctrine, an
3 omission to perform a contract cannot give rise to tort damages when a plaintiff claims
4 only economic loss, as plaintiffs do here. See Aas v. Superior Court, 24 Cal. 4th 627,
5 643 (2000); see also Oracle USA, Inc. v. XL Global Servs., Inc., 2009 WL 2084154, *4
6 (N.D. Cal. July 13, 2009).

7 The second “count” alleges nothing more than a breach of contract claim, and this
8 case does not provide one of the limited situations where such a claim might be viable.

9 c. Third “count”

10 In the third “count,” plaintiffs allege that the fiduciary duty imposed in connection
11 with the purported ACS Agreement required ACS to be honest and truthful with respect to
12 the expenses it was charging to plaintiffs, and that ACS breached this duty when
13 Robinson, in his capacity as the agent of ACS performing the purported ACS Agreement,
14 fraudulently induced plaintiffs to pay the \$25,000 “private investigation charge” by
15 misrepresenting it as an audit expense. FAC ¶¶ 94-95. Plaintiffs also allege that ACS
16 breached its fiduciary duty by causing “plaintiffs” to pay Realini’s and Martin’s salaries
17 and ACS’s bookkeeping and office expense fees, with knowledge that defendants had no
18 intention of performing and were conspiring to deprive “plaintiffs” of the benefits of the
19 “2013 Transaction.” FAC ¶ 96.

20 ACS argues there is no breach of fiduciary duty based on the purported ACS
21 Agreement, and that this “count” fails to identify which plaintiff is allegedly owed the
22 fiduciary duty by ACS. First, ACS asserts, the purported Agreement is not an
23 enforceable contract, and plaintiffs allege no facts showing how the purported Agreement
24 imposes a fiduciary duty on ACS.

25 ACS contends that the allegation that ACS owed a fiduciary duty to be “honest and
26 truthful” with respect to the expenses it was charging plaintiffs, see FAC ¶ 94, is
27 insufficient to support this claim because a fiduciary duty must be based on more than
28 just the duty to be honest, which is imposed on any contracting party. ACS asserts that

1 to the extent that it undertook any obligations, they would have related primarily to
2 maintaining compliance of the Obopay MTLs with applicable laws, and not to any special
3 duties owed to plaintiffs. Without more, ACS argues, plaintiffs cannot demonstrate the
4 existence of any fiduciary duty.

5 ACS also argues that plaintiffs fail to allege how participating in the invoicing of
6 Obopay's expenses, including the \$25,000 charge for Deloitte, could have breached any
7 fiduciary duties owed by ACS. ACS adds that even assuming for the sake of argument
8 that its participation in the invoicing of Obopay's expenses was not "honest and truthful,"
9 as plaintiffs allege, such activity would merely constitute a breach of the purported ACS
10 Agreement, and not a breach of a fiduciary duty.

11 In opposition, plaintiffs assert that the FAC establishes that Robinson himself
12 owed a fiduciary duty as an officer of Obopay to MHP-UK as a minority shareholder, and
13 that Robinson knowingly undertook to act for the benefit of plaintiffs in connection with
14 the "2013 Transaction." As above, with regard to the first "count," plaintiffs contend this is
15 shown by Robinson's assurances that "[y]ou can certainly set the salaries of the
16 compliance team as they will eventually work for you" and "[w]e will be very transparent
17 about costs." See FAC, Exh. D (December 15, 2012, email relating to negotiations over
18 plaintiffs' acquisition of the Obopay MTL rights). As before, they argue that Robinson's
19 alleged fiduciary duties can also be imputed to ACS.

20 In addition, plaintiffs assert that ACS directly undertook fiduciary obligations to
21 both plaintiffs by virtue of the purported ACS Agreement, pursuant to which they claim
22 that ACS directly promised to "provide" Robinson to serve on the Obopay board and
23 "vote and protect the interests" of MHP, and that it directly promised to do the
24 bookkeeping contemplated by the "2013 Transaction" in manner that "insure[d] [a]
25 transparent view of expenses/books [was] provided to" plaintiffs. See FAC Exh. H.

26 Finally, plaintiffs contend that just like Realini, Robinson had a fiduciary duty that
27 required him to disclose to plaintiffs that he suspected unlawful activities that he felt
28 obliged to report to law enforcement. They assert that this fiduciary duty prevented him

1 from concealing these facts for months in order to cause plaintiffs to continue paying for
2 Obopay's operations. In addition, they also appear to be suggesting that this alleged
3 fiduciary duty should be imputed to ACS.

4 The court finds that the motion must be GRANTED as to the third "count."
5 Plaintiffs have alleged no facts showing that ACS owed them a fiduciary duty. The
6 purported ACS Agreement is not an enforceable contract, and plaintiffs allege no facts
7 showing how it imposes a fiduciary duty on ACS (or on anyone).

8 The allegation that ACS owed a fiduciary duty to be "honest and truthful" with
9 regard to the expenses it was charging plaintiffs is insufficient to support this claim. A
10 fiduciary duty must be based on more than just the duty to be honest, which is imposed
11 on any contracting party. See Comm. On Children's Television, Inc. v. Gen. Foods Corp.,
12 35 Cal. 3d 197, 222 (1983). Plaintiffs allege no facts showing that ACS undertook any
13 obligations in addition to those that would attach to any party under a contract, and that to
14 the extent that it undertook any obligations, they would have related primarily to
15 maintaining compliance of the Obopay MTLs with applicable laws, and not to any special
16 duties owed to plaintiffs.

17 As for the \$25,000 audit charge, plaintiffs allege no facts showing how ACS owed
18 either of the plaintiffs a fiduciary duty in connection with commissioning the audit or the
19 charging it to plaintiffs. Indeed, there are no facts alleged showing any connection
20 between the audit and ACS.

21 4. Fraud and deceit

22 In the fourth cause of action for fraud and deceit, plaintiffs assert three "counts" –
23 a claim by MHP-USA against Martin and Obopay, alleging fraudulent inducement in
24 connection with March 2012 Agent Agreement; a claim by MHP-USA against Realini,
25 Robinson, and Martin, alleging fraudulent inducement in connection with March 2013
26 transfer of \$4 million in customer funds; and a claim by "plaintiffs" against Robinson and
27 ACS, in connection with May 2013 invoice for \$25,000 for "audit" expense which they
28 claim was really a charge for private investigator.

1 Defendants argue that the FAC fails to state a cause of action for fraud and deceit.
2 Under California law, the elements of a claim of fraud are (a) misrepresentation (false
3 representation, concealment, or nondisclosure); (b) knowledge of falsity; (c) intent to
4 induce reliance; (d) justifiable reliance; and (e) resulting damage. Lazar v. Sup. Court, 12
5 Cal. 4th 631, 638 (1996). Fraud in the inducement is a subset of fraud, occurring when
6 “the promisor knows what he is signing but his consent is induced by fraud, mutual
7 assent is present and a contract is formed, which by reason of the fraud, is voidable.”
8 Hinesley v. Oakshade Town Ctr., 135 Cal. App. 4th 289, 294-95 (2005) (citations
9 omitted). In addition, as noted above, Rule 9(b) requires that a party alleging fraud in
10 federal court “state with particularity the circumstances constituting fraud or mistake.”

11 Here, plaintiffs appear to be also alleging concealment or failure to disclose. The
12 elements of a claim for fraudulent concealment require the plaintiff to show that (1) the
13 defendant concealed or suppressed a material fact, (2) the defendant was under a duty
14 to disclose the fact to the plaintiff, (3) the defendant intentionally concealed or
15 suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff was unaware of
16 the fact and would not have acted as he did if he had known of the concealed or
17 suppressed fact, and (5) as a result of the concealment or suppression of the fact, the
18 plaintiff sustained damage. See Marketing West, Inc. v. Sanyo Fisher (USA) Corp., 6
19 Cal. App. 4th 603, 612-613 (1992).

20 The duty to disclose may be established where there is a confidential relationship
21 between the parties, defendant has made a representation which was likely to mislead
22 due to the nondisclosure, there is active concealment of undisclosed matters, or one
23 party has sole knowledge of or access to material facts and knows such facts are not
24 known to or discoverable by the other party. Goodman v. Kennedy, 18 Cal. 3d 335, 346-
25 347 (1076); see also Linear Tech. Corp. v. Applied Materials, Inc., 152 Cal. App. 4th 115,
26 132 (2007).

27 a. First “count”

28 In the first “count,” plaintiffs allege that Martin and Obopay fraudulently induced

1 MHP-USA into entering into the Agent Agreement by representing that Obopay had
2 compliance expertise and could provide regulatory compliance solutions for plaintiffs'
3 U.S. operations, and that the New York and California MTLs were "pending and
4 imminent."

5 Defendants argue that this "count" fails to state a claim because by the time the
6 Agent Agreement was signed, plaintiffs had seen a list of every state in which Obopay
7 was licensed (and that list of states was incorporated into the Agreement). Thus,
8 defendants assert, MHP-USA knew that Obopay was not licensed in every state, and
9 cannot reasonably claim to have relied on the statements by Martin and Obopay.
10 Similarly, they argue, the allegation that Martin failed to disclose that Obopay had
11 abandoned MTLs fails to state a claim because MHP-USA had, as part of signing the
12 Agent Agreement, full knowledge of where Obopay was licensed.

13 Furthermore, defendants contend, the alleged misleading statements are not
14 actionable statements of existing fact, but rather each is a subjective statement of opinion
15 which cannot be proven false – e.g., the statement that Obopay "could provide a
16 regulatory compliance solution."

17 In opposition, plaintiffs assert that the FAC adequately pleads that Martin and
18 Obopay fraudulently induced MHP-USA to enter into the Agent Agreement in 2012.
19 In response to defendants' argument that plaintiffs' reliance was unreasonable, plaintiffs
20 point to FAC ¶ 106, where they allege, "When plaintiffs learned that Obopay lacked
21 current MTLs for New York and California, just prior to the execution of the Agent
22 Agreement, Martin misrepresented that those MTLs were pending and imminent, that it
23 was just a matter of waiting on final approvals, and that MHP-USA could proceed with
24 money transmissions in those states in the meantime." They also point to FAC ¶ 107,
25 where they allege that "Martin knew but failed to disclose that Obopay had effectively
26 abandoned all its MTLs by declining to obtain a 2011 annual audit, Obopay had
27 abandoned its New York and California MTL applications in particular, or that Obopay's
28 U.S. MTLs were dormant because it had stopped supporting them."

1 In response to defendants' argument that the challenged statements were merely
2 statements of opinion, plaintiffs contend that the FAC plainly alleges numerous
3 misrepresentations of fact. For example, they assert, the representation that Obopay
4 was a "fully licensed money transmitter," see FAC ¶ 17, and the representation that
5 certain MTL approvals were "pending or imminent," see FAC ¶ 19-20, are both
6 statements of fact. Further, they assert the FAC adequately pleads facts that
7 demonstrate a course of conduct and misrepresentations that were designed to mislead.

8 Plaintiffs contend that defendants' "merely opinion" argument fails under these
9 circumstances for the further reason that Martin and Obopay claimed to have the MTL
10 compliance expertise, see FAC ¶ 14, and thus cannot escape liability by claiming that the
11 representations were merely opinions.

12 The motion to dismiss the first "count" is DENIED. The court finds that this claim
13 raises factual issues that are not appropriate for decision on a Rule 12(b)(6) motion,
14 although the court does agree with defendants that any claim based on reporting to law
15 enforcement would be barred by the litigation privilege.

16 b. Second "count"

17 In the second "count," plaintiffs allege that Realini, Robinson, and Martin
18 fraudulently induced plaintiffs to transfer \$4 million to Obopay by representing that "the
19 existing Obopay agency program was not noncompliant," and that Obopay "needed
20 custody and control of an amount equal to the U.S. client fund in the Obopay/Payza
21 customer accounts for MTL compliance purposes," and that "this issue could be resolved
22 through the transfer of the fund and provision of daily customer balance reports to
23 Obopay." See FAC ¶ 112-113.

24 Defendants assert that this claim must be dismissed because MHP-USA does not
25 specify which defendant made the allegedly false statements, and does not even allege
26 that the statements were false. Defendants also contend that the allegation that they
27 failed to disclose that they had initiated "hostile action" against plaintiffs (i.e., the report to
28 DHS), FAC ¶ 114, is not chronologically plausible, because the meeting at which the

1 alleged non-disclosure took place occurred on March 23, 2013, and they did not retain
2 Deloitte to conduct the “Due Diligence” audit until May 2013.

3 Defendants argue further that plaintiffs have alleged no facts showing a duty to
4 disclose; that imposing a duty on corporate officers to disclose to the actor suspected of
5 acting illegally that the illegal conduct was being reported to law enforcement would be
6 contrary to public policy; and that this claim is based on a protected activity (a report to
7 law enforcement). Thus, defendants assert, because plaintiffs have not alleged (and
8 cannot allege) that defendants owed a duty to plaintiffs to disclose that plaintiffs' illegal
9 activity had been reported to law enforcement, the cause of action for fraud based on
10 nondisclosure must be dismissed.

11 In opposition, plaintiffs assert that the FAC states a claim against Realini, Martin,
12 and Robinson for fraudulently inducing MHP-USA to transfer \$4 million to Obopay,
13 pointing to the allegations that defendants represented to Firoz Patel and Ferhan Patel
14 “that they had made the determination that existing Obopay agency program was non-
15 compliant; that Obopay needed custody and control of an amount equal to U.S. client
16 fund in Obopay/Payza customer accounts for MTL compliance purposes; but that this
17 issue could be resolved through MHP-USA's transfer of the fund and provision of daily
18 customer balance reports to Obopay.” See FAC ¶ 113.

19 In response to defendants' argument that the pleading is defective because it fails
20 to specify which defendant said what, plaintiffs contend that the FAC explains that this
21 was a telephonic committee meeting, on March 28, 2013, where all three of the individual
22 defendants collectively joined in the discussion and representations regarding why MHP-
23 USA needed to transfer the money to Obopay, see FAC ¶ 52, 113; and that as a result,
24 plaintiffs transferred the \$4 million 13 days later, see FAC ¶ 54. Plaintiffs claim that these
25 allegations satisfy Rule 9(b) because they are specific enough to give defendants notice
26 of the particular misconduct which is alleged to constitute the fraud charged.

27 In response to defendants' argument that it is implausible that they had already
28 determined by March 28, 2017, when the meeting occurred, that they were going to

1 report MHP-USA to law enforcement and cancel the 2013 Transaction, plaintiffs assert
2 that the relevant question is not when the reporting occurred, but whether the defendants
3 sincerely believed at the time that the \$4 million transfer would cure the regulatory issues.
4 In plaintiffs' view, the circumstances strongly suggest that they had no such belief.

5 The motion to dismiss the second "count" is DENIED. The court finds that these
6 claims raise factual issues are not appropriate for decision on a Rule 12(b)(6) motion,
7 although the court does agree with defendants that any claim based on reporting to law
8 enforcement would be barred by the litigation privilege.

9 c. Third "count"

10 In the third "count," which is asserted against Robinson and ACS, plaintiffs allege
11 they were defrauded by Robinson when he sent them the invoice that included the
12 \$25,000 charge for "Deloitte Financial Advisory Services LLP – Professional Services –
13 Audit Matters," which they claim Robinson falsely represented as an "auditing expense."
14 FAC ¶¶ 116, 118. They allege that Robinson caused Obopay to transmit the invoice to
15 "plaintiffs" in connection with the purported ACS Agreement, and fraudulently induced
16 MHP-USA to pay the invoice. *Id.* They claim that ACS is liable under a theory of
17 respondeat superior because Robinson was ACS's agent acting within the scope of
18 agency under the purported ACS Agreement. FAC ¶ 120

19 Defendants argue that this "count" must be dismissed because plaintiffs have not
20 alleged any misrepresentation of fact. They assert that it is apparent from the FAC that
21 the statement was not false, as Deloitte was retained for auditing purposes. They
22 contend that while plaintiffs may not have liked that they were the target of the audit, this
23 does not change the fact that Robinson's statement that the charge was for "auditing
24 expenses" was not false.

25 ACS also argues separately that this claim should be dismissed because it is not
26 pled in accordance with Rule 9(b), which applies to an agency relationship where the
27 fraud claim is based on an agency theory. Here, ACS asserts, the FAC alleges no facts
28 showing that Robinson holds power to alter the legal relationship between ACS and third

1 persons, or between ACS and Robinson; that Robinson is a fiduciary with respect to
2 matters within the scope of the agency; or that ACS has the right to control the conduct of
3 Robinson with respect to matters entrusted to him. ACS asserts that plaintiffs simply
4 allege in a conclusory fashion that Robinson was acting as an agent of ACS and that
5 Robinson was ACS's only "employee." See FAC ¶¶ 31, 120. Moreover, plaintiffs
6 contend, the contents of the purported ACS Agreement suggest that if at all, Robinson
7 would have been acting as Obopay's agent, not ACS's agent, because Robinson had
8 allegedly agreed to act as president and board compliance member of Obopay. See
9 FAC Exh. H, ¶¶ 1-2.

10 ACS contends that this claim should be dismissed for the further reason that it is
11 not really a claim of affirmative misrepresentation, but rather a claim of failure to disclose
12 the alleged full scope of the auditing services provided by Deloitte. See FAC ¶¶ 116-118.
13 ACS argues that there was no fiduciary relationship between itself and plaintiffs, and
14 there can thus be no fraud claim based on any alleged failure to disclose to plaintiffs
15 (through Robinson) that Deloitte was retained to further investigate plaintiffs' suspected
16 illegal activity.

17 Finally, ACS asserts, although plaintiffs allege that the Deloitte charges related to
18 "the private investigation firm that defendants had engaged to pursue allegations of
19 unlawful activity against plaintiffs[,] they don't actually plead with particularity how
20 Robinson's statement that the \$25,000 charge was related to "auditing expenses" was
21 intentionally false.

22 In opposition, plaintiffs assert that the FAC adequately states a claim against
23 Robinson and ACS for fraudulently inducing MHP-USA to pay \$25,000 to Obopay.
24 Plaintiffs point to FAC ¶ 117, where they allege that Ferhan Patel questioned Robinson in
25 an email about the \$25,000 charge, and that "when pressed," Robinson "stated that the
26 charge was for an Obopay auditing expense that plaintiffs had agreed to pay under the
27 ACS Agreement." As for defendants' remaining arguments – that Robinson's
28 representation was not false; that the private investigation should be considered an audit

1 charge as a matter of law; and that neither Robinson nor ACS had any duty to disclose its
2 true nature or purpose – plaintiffs simply dismiss them as "meritless."

3 Plaintiffs also argue that the pleading of the fraud claim(s) easily satisfies Rule
4 9(b) because it identifies the date, participants, and contents of the communications
5 involved, which are all in writing; and, they contend, the exact invoice and email chain at
6 issue are well known to all parties because they were exhibits to the motion for security
7 bond and discussed in that briefing.

8 The motion to dismiss the third "count" is GRANTED. The claim is dismissed
9 because it is not pled in accordance with Rule 9(b) with respect to Robinson's alleged
10 agency with ACS, because the FAC does not allege facts showing that ACS owed
11 plaintiffs a fiduciary duty as required to state a fraud claim based on nondisclosure under
12 the circumstances alleged, and because the FAC does not plead particularized facts
13 showing how the statements allegedly made by Robinson regarding the \$25,000 charge
14 by Obopay were intentionally false.

15 Similarly, plaintiffs have not stated a claim against Robinson, because they have
16 not alleged facts showing that the reference to an "auditing" expense was intentionally
17 false, and indeed, it is apparent from the FAC that Deloitte had been retained for auditing
18 purposes. The Deloitte report, a copy of which was attached as Exhibit A to Robinson's
19 Declaration (Doc. 52) in support of defendants' September 21, 2016 motion for a bond,
20 was in fact presented as a "Due Diligence Report" setting forth the results of public record
21 background research. And while plaintiffs appear to be arguing in their opposition that
22 Robinson had a duty to disclose the precise subject matter of the audit prior to the time it
23 was completed, the FAC does not in fact allege facts supporting such a duty.

24 **CONCLUSION**

25 In accordance with the foregoing, the court GRANTS ACS's motion to dismiss,
26 and GRANTS the motion to dismiss of Realini, Martin, Robinson, and Obopay in part and
27 DENIES it in part.

28 1. The motion to dismiss the claims of quasi-contract and constructive fraud

1 asserted against Realini and Obopay is GRANTED. The dismissal is with prejudice.

2 2. The motion to dismiss the claim of breach of the Stock Agreement asserted
3 against Realini and Obopay, the claim of breach of the purported ACS Agreement
4 against ACS, and the claims of breach of the implied covenant in connection with those
5 Agreements is GRANTED. The dismissal is with prejudice.

6 3. The motion to dismiss the claim of breach of the Option Agreement
7 asserted against Realini and Obopay, and the claim of breach of the implied covenant in
8 connection with that Agreement is DENIED.

9 4. The motion to dismiss the claims of breach of fiduciary duty asserted
10 against all defendants is GRANTED. The dismissal is with prejudice.

11 5. The motion to dismiss the first and second “counts” of the claim of fraud
12 and deceit asserted against the individual defendants and Obopay is DENIED.

13 6. The motion to dismiss the third “count” of the claim of fraud and deceit
14 asserted against Robinson and ACS is GRANTED. The dismissal is with prejudice.

15 7. All claims against ACS have been dismissed, with prejudice. However
16 because ACS’s request for costs has not been briefed and is not supported by
17 documentation, the court DEFERS ruling on this part of ACS’s motion until the other
18 issues remaining in the case have been resolved.

19
20 **IT IS SO ORDERED.**

21 Dated: September 14, 2017



22
23 PHYLLIS J. HAMILTON
24 United States District Judge